Filed 12/16/08 J. Kel Painting & Wallcovering, Inc. v. Burbank Unified School Dist. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

J. KEL PAINTING & WALLCOVERING, INC., Plaintiff and Appellant, v. BURBANK UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B203791 (Los Angeles County Super. Ct. No. ES011566)

APPEAL from an order of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

Ackerman, Cowles & Lindsley, Richard D. Ackerman, and Michael W. Sands, Jr., for Plaintiff and Appellant.

Doumanian & Associates and Nancy P. Doumanian for Defendant and Respondent.

INTRODUCTION

Appellant, J. Kel Painting & Wallcovering, Inc. (J. Kel or appellant), appeals from the denial of its petition for writ of administrative mandamus, filed in the superior court pursuant to Code of Civil Procedure section 1094.5, to review a decision of the Burbank Board of Education (Board). Appellant contends that it was under contract to paint portions of a school, and was not afforded a hearing prior to the substitution of a new painter, as required by law. Appellant also contends that it was not given proper notice of the substitution, that the evidence showed that its performance under the contract was excused, and that it was deprived of a constitutionally protected property right without due process. Upon review of the administrative record, we conclude the trial court's findings and decision are supported by substantial evidence. Thus, we reject appellant's contentions and affirm the order denying the petition.

BACKGROUND

1. *Procedural Background*

Appellant was terminated as a subcontractor on a project for respondent Burbank Unified School District. Approximately five weeks later, the Board held a hearing pursuant to Public Contract Code section 4107, to consider appellant's objections to the request of prime contractor, PW Construction, Inc. (PW), to substitute another painting subcontractor in place of appellant.[1]

After considering the testimony of several witnesses, including appellant's president, the Board granted the request for substitution, upon finding that appellant had failed or refused to perform its contract by:

"1. the failure to follow an agreed upon schedule for performance;

---

[1] All further statutory references are to the Public Contract Code, unless otherwise indicated.

"2. the failure to tender required submittals to PW Construction, Inc. and/or [the architect];

"3. the failure to commence and continue to perform the full scope of the contract with PW Construction, Inc.; and

"4. the failure to adequately man the job given the construction schedule."

Appellant filed a petition for writ of administrative mandamus in the superior court. The trial court applied the independent judgment test to its review of the administrative proceedings, and found that the weight of the evidence supported respondent's findings and decision.[2] The court adopted its tentative ruling as its final ruling, and denied the petition.[3] The court entered a written order on September 26, 2007, and appellant timely filed a notice of appeal from the order.

2. *Evidence Adduced at the Administrative Hearing*

Appellant entered into a subcontract with prime contractor PW to provide materials and labor in the painting of portions of Luther Burbank Middle School. Appellant was provided a work schedule for the project, and on September 1, 2006, Walter Froton, the PW senior project manager, gave appellant a 48-hour notice to begin work. However, appellant did not begin work within the scheduled

---

[2] The court cited *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817, in which the California Supreme Court reaffirmed the rule that "[i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence."

[3] The court's order denying the petition is entitled, "Order of Dismissal"; however, the findings incorporated from the tentative ruling make clear that the court denied, not dismissed, the petition.

time, and instead requested clarification of the scope of the work in relation to the school gymnasium and cafeteria, which were both included in the subcontract. On September 6, 2006, PW terminated the subcontract and a few days later, notified appellant's bonding company. By that time appellant had done nothing pursuant to the subcontract, other than submit partial submittals.[4]

Appellant's bonding company convinced PW to rescind the termination, and appellant sent a crew, but the crew was undermanned. Froton testified that appellant's crew consisted of only four or five men, whereas 10 to 15 were required to meet the schedule. Thus, on September 15, Froton sent appellant an updated schedule and a notice to provide additional manpower. Appellant promised Froton it would send additional workers, but sent only one.

On September 18, 2006, appellant's president, James Kelly, faxed a letter to Froton, notifying PW that he had retained a testing company which found significant levels of lead in several old paint samples from the gymnasium ceiling, and had therefore shut down the preparation work. Kelly requested PW to have a hazardous materials abatement company do the scraping, to minimize danger to appellant's employees.

Froton testified that PW had previously had the old paint tested by a lead abatement consulting firm, Winzler & Kelly, which had found the lead in the ceiling to be below dangerous levels. However, PW brought the consultants in to test again. They found hazardous levels in some areas, but not the gymnasium ceiling, which did not require special abatement.

Winzler & Kelly employee Michael Cardone testified that old paint does not require abatement, and painters may continue working unless the lead content

---

[4] Froton testified that submittals identify the paint product to be used. In general, submittals are due within 30 days after the subcontract is awarded, and must be approved before the subcontractor can begin its work.

exceeds 600 parts per million. The test results for the ceiling paint showed levels below that amount. The consultant did find, however, hazardous levels of lead on the cabinetry, some windows, and the canopies.

PW asked appellant to continue working on the ceiling while other areas were abated, but appellant did not do so, which put the project further behind schedule. On September 25, PW sent appellant a 24-hour notice to meet the schedule or be terminated from the project. Appellant responded the same day by notifying Froton that it had hired a lead abatement specialist to complete the scraping of the ceiling and safe removal of the loose paint. PW did not permit appellant's abatement crew to work, because it had not followed OSHA standards.[5] Froton testified that sometime in September 2006, OSHA inspectors came to the site and remained for two days, but never notified PW of any violations.

The following day, September 26, 2006, Froton notified appellant that PW had terminated appellant's subcontract, and that appellant's use of its own abatement company was not permitted in light of appellant's failure to comply with the requirements of the project specifications, including transmittals and notices to the appropriate agencies. Two or three weeks after terminating appellant's contract, and approximately two weeks prior to the administrative hearing, PW hired a replacement contractor.[6]

---

[5] See California Occupational Safety and Health Act of 1973 (Cal-OSHA). Labor Code section 6300 et seq.

[6] Respondent requests that we take judicial notice of appellant's cross-complaint in the action brought by PW, in Los Angeles County Superior Court No. EC046215. Only relevant matters may be judicially noticed, and the party requesting notice must make a showing of relevance. (*Mangini v. R. J. Reynolds Tobacco Co*. (1994) 7 Cal.4th 1057, 1062-1064, overruled on another point in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.) As respondent has made no showing of relevance, we deny the request.

Kelly testified that he believed he was terminated because he called OSHA and "whistle blew" on PW. He explained that his painters were not lead-trained, and could not be expected to scrape lead-containing paint. He testified that he had not scraped a job in 40 years. Kelly submitted a letter sent to PW on September 26, 2006, explaining that PW had rejected his original submittals, and that the paint company took six days to prepare new ones, which were sent to PW September 26, 2006.[7]

DISCUSSION

1. *Contentions*

Appellant contends that reversal is required because it was not afforded a hearing prior to the substitution of a new painting subcontractor, as provided in section 4107. Appellant contends that by proceeding after the substitution, respondent deprived it of a constitutionally protected property right without due process. Further, appellant contends that reversal is required because PW sent it the notice of its intent to substitute, whereas the statute required respondent to send the notice. Although appellant contends that this appeal presents only a question of law, appellant also contends that the evidence showed that the concentration of lead in the old paint created a hazardous condition which justified appellant's refusal to man the job until completion of lead abatement. Appellant further contends that respondent's findings were not supported by evidence establishing any of the statutory grounds for substitution.

2. *Standard and Scope of Review*

The trial court's inquiry in an administrative mandamus proceeding under Code of Civil Procedure section 1094.5, subdivision (b), "extend[s] to the questions whether the respondent has proceeded without, or in excess of

---

[7] Appellant does not challenge the Board's finding that appellant failed "to tender required submittals to PW Construction, Inc. and/or [the architect]."

jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Because the trial court found that appellant's rights were fundamental and vested, it conducted an independent review of the administrative record. (See generally *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1531.) Our review is limited to determining whether the trial court's findings and decision are supported by substantial evidence. (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 824.) Issues of law are reviewed de novo, including "'"the ultimate questions, whether the agency's decision was . . . unlawful or procedurally unfair . . . ."'" (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169.)

3. *Section 4107*

Public Contract Code section 4107 provides in relevant part: "A prime contractor [on a public project] whose bid is accepted may not: [¶] (a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may . . . consent to the substitution of another person as a subcontractor in any of the . . . situations [enumerated in this subdivision]."

"Prior to approval of the prime contractor's request for the substitution, the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified has five working days within which to submit written objections to the substitution to the awarding authority. . . . [¶] If written objections are filed,

the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution." (§ 4107, subd. (a)(9).) The prime contactor shall not "[p]ermit a subcontract . . . to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer." (§ 4107, subd. (b).)

4. *Substantial Compliance*

In a recently published opinion, this court recognized that section 4107 contemplates that an awarding authority's consent to substituting out a subcontractor and substituting in a replacement will occur before the prime contractor permits the replacement to perform any work. (*Titan Electric Corp. v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 188, 193 (*Titan*).) We held, however, that a post-substitution hearing will substantially comply with the statute "so long as the procedure used actually complies with the substance of the reasonable objectives of the statute: namely, the prevention of bid peddling and bid shopping after the award of a public works contract, and the providing of an opportunity to the awarding authority to investigate the proposed replacement subcontractor before consenting to substitution." (*Ibid*.)

Appellant contends that *Titan* is distinguishable from this case because here the evidence showed that appellant's subcontract was terminated in retaliation for whistle blowing. Appellant notes that in *Titan*, the subcontractor abandoned the project because it was winding down its business and had insufficient funds to complete the project, whereas here, appellant contends, it pulled its employees off the site due to hazardous conditions.

Appellant proffered evidence of its whistle-blowing and hazardous condition excuses to the Board. The Board impliedly rejected the evidence when it found that appellant had failed to commence and continue to perform the full scope of the

contract with PW, in that it did not follow the agreed upon schedule, tender required submittals, or adequately man the job. The Board's rejection of appellant's excuses is supported by substantial evidence. PW's foreman and lead expert both testified that the ceiling was safe to prepare and paint. Appellant's president may have "blown the whistle" by calling OSHA, but no violations were reported, and the evidence did not show PW's conduct was in retaliation for appellant's actions. We thus defer to the Board's findings. (See *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 674 [agency's decisions given substantial deference and presumed correct].)

Like the subcontractor in *Titan*, appellant pulled its employees off the job and refused to perform its subcontract, without reasons that would justify denying the request for substitution. Although appellant's reasons were different from those in *Titan*, we find its holding persuasive: A section 4107 hearing held after the substitution constitutes substantial compliance with the objectives of the statute, so long as the procedure did not permit bid shopping or bid peddling, and the public entity had the opportunity to investigate the proposed replacement subcontractor before consenting to substitution. (*Titan*, *supra*, 160 Cal.App.4th at pp. 193, 205.)

Appellant does not contend that the Board had no opportunity to investigate the proposed replacement subcontractor. However, it contends that *Titan* is inapplicable because it could be inferred from evidence of appellant's demand for additional compensation that PW was bid shopping. We disagree.

"Bid shopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. Bid peddling, conversely, is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job.

[Citations.]" (*Southern Cal. Acoustics Co. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 726, fn. 7; see also *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 540, fn. 3.) Appellant's demand for additional compensation meets neither definition.

Appellant suggests that the absence of a notice of intent to substitute, served by the school district prevents a finding of substantial compliance with section 4107. We disagree. The absence of a formal notice does not prevent a finding of substantial compliance where there has been actual compliance with the reasonable objectives of the statute. (See *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 667-669 [substantial compliance with the reasonable objectives of the statute found despite tardy notice required by section 4107.5].) Here, appellant was afforded a full evidentiary hearing at which it was represented by counsel, and had ample opportunity to challenge the facts underlying its termination. In short, respondent substantially complied with the requirements of section 4107. Thus, we find no due process violation.

5. *Substantial Evidence to Support Findings*

Appellant challenges the Board's findings. Appellant lists the nine grounds for substitution in section 4107, subdivision (a)(1) through (a)(9). Discussing each of them, appellant contends there was no evidence to support any of the nine. As the Board made its decision only under subdivision (a)(3), we need not consider appellant's discussion of the other statutory grounds. Appellant contends the Board's finding under subdivision (a)(3) was erroneous, because appellant's refusal to perform the subcontract was justified by the dangerous conditions on the site, which PW misrepresented as safe.

There was no evidence that PW misrepresented the safety of proceeding with the work, and substantial evidence supports the Board's implied finding that the old ceiling paint did not present a hazard to appellant's employees. PW's

foreman and lead expert both testified that the ceiling was safe to prepare and paint. PW brought its lead expert to the site prior to awarding the subcontract, and again after appellant's expert reported high lead levels in a sample chip. The consultant found hazardous levels in some areas, but not the gymnasium ceiling, which did not require special abatement. Nevertheless, appellant refused PW's request to continue working on the ceiling while other areas were abated, which put the project further behind schedule.[8]

We conclude that because substantial evidence supports the Board's findings, the trial court did not err in denying the petition.

DISPOSITION

The order of the superior court is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J. SUZUKAWA, J.

---

[8] Appellant does not dispute the evidence to support the finding that it failed to tender required submittals to PW. Appellant had tendered only partial submittals, which were rejected, and its president admitted it did not send the new submittals until September 26, 2006. ~(AA 117, 248, 462-Tab 42)~